

No Evidence That Mold Caused Death

By Drew Broaddus

It is well established that to prove negligence, a plaintiff must show that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant's breach caused the plaintiff's injury. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72 (2005). To prove causation, a plaintiff must prove both cause in fact and proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163 (1994). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* A plaintiff can prove cause in fact by circumstantial evidence, but the plaintiff's circumstantial evidence "must facilitate reasonable inferences of causation, not mere speculation." *Id.* The plaintiff's theory of causation must have some basis in facts from which the jury could conclude that, more likely than not, the plaintiff's injuries would not have occurred but for the defendant's conduct. *Id.*

Causation was the central, and ultimately dispositive, issue in *Ficaj v Pray*, unpublished opinion per curiam of the Court of Appeals, rel'd 12/20/12 (Docket No. 307818), a case which involved the tragic death of a toddler from a mysterious illness. Shortly before the child became ill, Plaintiff (the child's father) had purchased a home from Defendant. Plaintiff alleged that the decedent's illness was caused by the presence of mold in the house. More specifically, Plaintiff alleged that "Pray's negligent remodeling and repairs caused sewage and water to pool under the house, creating an unsafe condition that caused a large quantity of mold to grow, which in turn caused" the child's illness.

Defendant Pray moved for summary disposition of Plaintiff's claim, arguing that even if Pray had negligently repaired the home, a jury would have no reasonable basis to conclude that the condition of the home caused or contributed to the minor's death. In response, Plaintiff cited circumstantial evidence that Pray's negligent remodeling caused the mold, and that the mold had in fact caused the minor's death. The trial court granted the motion, noting that Plaintiff's doctors were not able to explain the specific symptoms exhibited by the decedent, nor could Plaintiff's doctors state a definite cause of death. Although the county medical examiner found structures in the decedent's brain that initially resembled a fungal infection, the Center for Disease Control subsequently found no evidence of bacterial, viral, or fungal infection. The trial court did consider Plaintiff's evidence that mold was present under the residence in 2010. However, there was no evidence that the mold was present in 2005 (when the minor's illness and death occurred), and no one had become seriously ill in the intervening time period. In short, the trial court found that Plaintiff's theory of causation was too speculative to submit to a jury.

SECRET WARDLE NOTES:

It is important to note that *Ficaj* was decided on summary disposition per MCL 2.116(C)(10). Generally, proximate cause is a factual issue to be decided by the trier of fact. However, if reasonable minds could not differ regarding the proximate cause of plaintiff's injury, the trial judge can decide the issue as a matter of law. *Nichols v Dobler*, 253 Mich App 530 (2002).

The Court of Appeals decision in *Ficaj* relied largely upon *Skinner*, *supra*, which is one of the definitive Michigan Supreme Court decisions regarding causation.

Under *Skinner*, *supra* at 163-165, more than a "mere possibility or a plausible explanation" is required. A basis in "slight evidence" is not enough, "[n]or is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id.* Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendants' conduct, the plaintiffs' injuries would not have occurred." *Id.*

CONTINUED...

On appeal, Plaintiff argued that a chain of circumstantial evidence established that the child had died from a fungal infection caused by Defendant's conduct. The circumstantial evidence cited by Plaintiff included (1) that other family members experienced symptoms consistent with a fungal infection when they moved into the house in 2005, (2) that the symptoms subsided when they moved out, (3) that mold was later found in the house, and (4) that mold could have caused the injuries to the child's brain, as noted by the county medical examiner on autopsy. In response, Defendant pointed to evidence that an uncontrolled immune response to insect bites could have explained the symptoms, and that the Center for Disease Control ruled out a fungal infection as the cause of death.

The Court of Appeals agreed with Defendant, and affirmed. The panel noted that "[a] plaintiff's circumstantial evidence is impermissibly conjectural if there are two or more explanations about how an event happened, and both explanations are equally plausible." The decedent's doctors initially diagnosed her with erythema multiforme, an immune condition. However, on autopsy, a pediatric infectious disease specialist concluded that she had a unique immune system and an uncontrolled reaction to an unidentified substance. The Court of Appeals further noted that the record was devoid of any indication that Plaintiff's experts would be able to testify that the child fell ill due to her exposure to toxic mold. Although Plaintiff "presented evidence that toxic mold *could* cause the type of injuries that existed" in the child's brain at her death, Plaintiff "presented no evidence that toxic mold *in fact* caused those injuries."

The panel distinguished *Genna v Jackson*, 286 Mich App 413 (2009) on multiple grounds. First, in *Genna* there was a four-day gap between the plaintiffs' illnesses and the mold's discovery. Here, the decedent passed away in 2005, her family discovered the mold under the house in 2010, and there was no evidence that anyone who lived in the house from 2005 to 2010 became seriously ill. Plaintiff presented evidence that another child developed a rash from insect bites in 2006, but no evidence that this led to a serious illness. Moreover, nothing linked that child's rash to mold. In *Genna*, a mold expert testified that there were unusually high quantities of unhealthy mold spores in the air in the living space. Here, the evidence was that the mold spore count in the living space was "very low" (although it was "very high" in the crawlspace). Also, in *Genna* there was evidence that a physician had linked at least one of the plaintiff's illnesses to mold. Here, the autopsy ultimately revealed "no evidence of bacterial, viral, or *fungal* infection" in decedent's brain.

CONTACT US

Troy
2600 Troy Center Drive
PO Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing
6639 Centurion Drive, Ste. 130
Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 600
Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2012 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Environmental Practice Group Chair
Bruce A. Truex

Editor
Bonny Craft

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Industry Line, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swsubscriptions@secrestwardle.com or 248-539-2850

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Boundaries – A guide for property owners and insurers in a litigious society
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Landowner's Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability